

<sup>2</sup> The Board notes that following the June 29, 2018 decision, OWCP received additional evidence. However, the Board's Rules of Procedure provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

impairment of the left upper extremity, for which she has previously received schedule award compensation; and (2) whether OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 12, 2004 appellant, then a 41-year-old physical therapy assistant, filed a traumatic injury claim (Form CA-1) alleging that, on May 11, 2004, she injured her left shoulder and left side of her neck when helping to reposition a patient while in the performance of duty. On July 7, 2004 OWCP accepted the claim for aggravation of cervical radiculopathy. Appellant continued to work limited duty.

On November 25, 2005 appellant filed a claim for a schedule award (Form CA-7).

By decision dated July 30, 2007, OWCP granted appellant a schedule award for nine percent permanent impairment of the left upper extremity.<sup>4</sup> On September 25, 2007 appellant appealed to the Board. By decision dated March 11, 2008, the Board affirmed the July 30, 2007 decision.<sup>5</sup>

On March 5, 2017 appellant filed a claim for an additional schedule award (Form CA-7). She indicated that she had retired, effective October 1, 2015. Medical evidence submitted included reports regarding a November 3, 2016 hospitalization when Dr. Robert Kimber, an orthopedic surgeon, performed anterior cervical discectomy and fusion.

By development letter dated March 28, 2017, OWCP informed appellant of the type of medical evidence needed to establish her claim for an additional schedule award. It afforded her 30 days to submit the necessary evidence.

In May 25, 2017 correspondence, appellant indicated that her physician was unwilling to provide an impairment evaluation.

On October 13, 2017 OWCP referred appellant to Dr. Simon Finger, a Board-certified orthopedic surgeon, for a second opinion to evaluate appellant's work-related condition and any

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<sup>3</sup> Docket No. 07-2428 (issued March 11, 2008); *Order Dismissing Appeal*, Docket No. 08-1670 (issued December 22, 2008); *Order Dismissing Appeal*, Docket No. 15-0875 (issued April 29, 2015); and *Order Dismissing Appeal*, Docket No. 15-1763 (issued February 10, 2016).

<sup>4</sup> The award was based on the opinion of Dr. Raymond Fletcher, an OWCP referral physician who is Board-certified in orthopedic surgery. In a June 6, 2007 report, he opined that appellant had nine percent permanent impairment of the left upper extremity. By report dated June 25, 2007, an OWCP medical adviser concurred with Dr. Fletcher's opinion.

<sup>5</sup> Docket No. 07-2428; *supra* note 3.

resulting permanent impairment, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>6</sup>

In a November 14, 2017 report, Dr. Finger noted that appellant had undergone cervical spine surgery in November 2016 and was currently experiencing improving hand weakness. He described his review of the statement of accepted facts and medical record. Examination findings included full painless neck range of motion, bilateral negative upper extremity Spurling's signs, full lumbar spine range of motion, and a negative straight leg raise. Dr. Finger found no atrophy in the upper and lower extremities, and no motor or sensory deficits present. He advised that maximum medical improvement (MMI) had been reached on November 14, 2017 and that, in accordance with *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), appellant had zero permanent impairment because she had no motor or sensory loss.

In a January 31, 2018 report, Dr. Arthur Harris, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), noted that appellant had previously received a schedule award for nine percent permanent impairment of the left upper extremity. He reviewed the medical record, including Dr. Finger's November 14, 2017 evaluation, which he found to be the date of MMI. The DMA opined that appellant had no upper extremity impairment in accordance with *The Guides Newsletter* because she had no neurologic deficit consistent with radiculopathy in the upper extremity.

By decision dated March 14, 2018, OWCP noted that appellant had previously received a schedule award for nine percent permanent impairment of the left upper extremity. It found that, based on Dr. Finger's physical examination findings as reviewed by the DMA, she was not entitled to an additional upper extremity schedule award because she had no peripheral nerve impairment on examination.

On June 8, 2018 appellant requested reconsideration. She submitted evidence previously of record including diagnostic studies and records of the November 2016 hospitalization.

OWCP also received additional medical evidence. Dr. Eric Letonoff, an osteopath Board-certified in orthopedic surgery, examined appellant on June 24, 2014. He diagnosed bilateral carpal tunnel syndrome and radicular syndrome of both upper extremities. In treatment notes dated November 21, 2016 to February 22, 2017, Dr. Kimber described appellant's postoperative care following the November 2016 cervical spine surgery.

By decision dated June 29, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a), finding that she had not submitted new and relevant evidence, or legal argument sufficient to warrant reopening the merits of her schedule award claim.

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<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

## **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA,<sup>7</sup> and its implementing federal regulations,<sup>8</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>9</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>10</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.<sup>11</sup> In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>12</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.<sup>13</sup> OWCP has adopted this approach for rating permanent impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009 *The Guides Newsletter*.<sup>14</sup> Specifically, OWCP will address upper extremity impairment originating in the spine through Table 15-14.<sup>15</sup>

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Id.* at § 10.404(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>11</sup> *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>12</sup> *J.M.*, *id.*; *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>13</sup> *R.B.*, Docket No. 17-1995 (issued August 13, 2018); *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>14</sup> *Supra* note 10 at Chapter 3.700, Exhibit 1, (January 2010); *The Guides Newsletter* is included as Exhibit 4.

<sup>15</sup> *Supra* note 6 at 425.

## ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her right upper extremity, or more than nine percent permanent impairment of her left upper extremity for which she previously received schedule award compensation.

OWCP accepted that appellant sustained an aggravation of cervical radiculopathy. By decision dated July 30, 2007, it granted appellant a schedule award for nine percent permanent impairment of the left upper extremity. By decision dated March 11, 2008, the Board affirmed the July 30, 2007 decision. The Board's review of the medical evidence submitted prior to July 30, 2007 is *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>16</sup>

On March 5, 2017 appellant submitted a claim for an additional schedule award. By decision dated March 14, 2018, OWCP denied the claim based on the opinions of Dr. Finger, an OWCP referral physician, as reviewed by the DMA, Dr. Harris.

The Board finds that Dr. Finger properly determined that appellant had no additional permanent impairment of either upper extremity.

In his November 14, 2017 report, Dr. Finger explained that he was rating permanent impairment of appellant's upper extremities under the standards of *The Guides Newsletter*. He properly determined that, as appellant exhibited no sensory or motor loss in either upper extremity, appellant had no impairment according to the standards of *The Guides Newsletter*. On January 31, 2018 the DMA reviewed Dr. Finger's report and concurred that, as appellant had no upper extremity motor or sensory deficits related to the accepted aggravation of cervical radiculopathy, she had no upper extremity permanent impairment under *The Guides Newsletter*.

On appeal appellant asserts that her condition has worsened since Dr. Fletcher reported nine percent permanent impairment of the left upper extremity in June 2007.<sup>17</sup> The only contemporaneous impairment evaluation of record, however, is the November 14, 2017 evaluation provided by Dr. Finger. The Board finds that the weight of the medical evidence rests with the opinions of Dr. Finger and the DMA. Dr. Finger based his opinion on an accurate factual and medical history and provided findings on examination to support his opinion. There is no contemporaneous medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* establishing that appellant has permanent impairment of a scheduled member due to the accepted cervical condition.<sup>18</sup>

Appellant, therefore, has not established permanent impairment of the right upper extremity, nor has she established permanent impairment of the left upper extremity greater than the nine percent previously awarded.

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<sup>16</sup> See *A.T.*, Docket No. 16-0738 (issued May 19, 2016).

<sup>17</sup> *Supra* note 4. As noted, Dr. Fletcher provided an impairment evaluation in June 2007.

<sup>18</sup> *J.M.*, *supra* note 11.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of FECA,<sup>19</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>20</sup>

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b), will be denied by OWCP without review of the merits of the claim.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Initially, the Board finds that OWCP properly considered appellant's correspondence as a request for reconsideration and not as a claim for an increased schedule award. Appellant did not claim a new award based on a new rating of permanent impairment for the accepted cervical radiculopathy.<sup>22</sup> Therefore, the issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), warranting further review of the merits of her claim.

With her June 8, 2018 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>23</sup>

Appellant submitted evidence previously of record with her reconsideration request. The Board has long held that evidence previously of record does not constitute a basis for reopening a

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<sup>19</sup> 5 U.S.C. § 8128(a).

<sup>20</sup> 20 C.F.R. § 10.608(b).

<sup>21</sup> *Id.* at § 10.608(b).

<sup>22</sup> See *G.T.*, Docket No. 18-0158 (issued May 11, 2018).

<sup>23</sup> See *M.M.*, Docket No. 18-0292 (issued July 9, 2018).

case.<sup>24</sup> While appellant submitted new medical evidence, none of it contained an impairment rating. Rather the medical evidence submitted pertained to her hospitalization for cervical spine surgery in November 2016, follow-up treatment notes by Dr. Kimber, and a new diagnosis of bilateral carpal tunnel syndrome, which has not been accepted by OWCP. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>25</sup> The underlying issue is whether appellant has submitted sufficient evidence to establish entitlement to a schedule award for a right upper extremity impairment and an increased left upper extremity schedule award due to the accepted cervical radiculopathy. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but in this case appellant did not submit relevant and pertinent new evidence with her reconsideration request.<sup>26</sup>

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant has not established permanent impairment of the right upper extremity, or greater than nine percent permanent impairment of the left upper extremity, for which she has previously received schedule award compensation. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>24</sup> *Id.*; see also *D.K.*, 59 ECAB 141 (2007).

<sup>25</sup> See *P.H.*, Docket No. 18-1020 (issued November 1, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>26</sup> See *supra* note 22.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29 and March 14, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 8, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board